No. 85-1222

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

STATE OF TEXAS, RESPONDENT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 84-4169, 84-4386

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY, and
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
INTERVENING-RESPONDENTS

THE STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ROAD-RAIL TRANSPORTATION COMPANY, INC.,
INTERVENING-RESPONDENT

Sept. 6, 1985

Jim Mattox, Atty. Gen., Justin Scott Wilson, Asst. Atty. Gen., Austin, Tex., for petitioner.

John Broadley, General Counsel, H. Glenn Scammel, I.C.C., Washington, D.C., John P. Legendre, Dallas, Tex., John J. Powers, III, John P. Fonte, Dept. of Justice, Antitrust Div., Washington, D.C., for respondents.

On Petitions for Review of
Interstate Commerce Commission
Decision Nos. 3962 and 39704

Before GARZA, POLITZ and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

The State of Texas seeks review of orders of the Interstate Commerce Commission, issued under 49 U.S.C. § 10505, granting exemptions from state and federal regulations to intrastate trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) activity done in conjunction with intrastate rail transportation. Concluding that the I.C.C. went beyond the scope of the authority granted by the Congress, we grant the petitions for review and reverse the challenged orders.

Facts

Several railroads operating in the State of Texas are engaged in the transportation of goods by combined rail and highway transportation. The rail carriers own trucks and using the TOFC and COFC rail/truck combination are able to contract with shippers for continuous carriage of goods between points whether served by rail or not. The entire rail portion of the transportation is intrastate. The entire highway portion of the transportation is intrastate.

The Railroad Commission of Texas asserted jurisdiction over these combination carriers because of the intrastate transportation of goods by rail. At the time these events occurred, Texas, along with most other states, had been given an interim or temporary certification by the I.C.C., authorizing it to regulate intrastate rail traffic. That certification has been terminated.[1]

After the I.C.C. exempted interstate TOFC and COFC activity from regulation, *see American Trucking Association v. I.C.C.*, 656 F.2d 1115 (5th Cir. 1981), two of the combination carriers petitioned the Railroad Commission of Texas for a similar exemption for intrastate operations. The Railroad Commission granted exemptions from regulation while the trailers and containers were being transported by rail but refused to exempt the highway portion of travel. The carriers sought relief from the I.C.C. which expanded the exemptions from regulation to cover all stages of the intrastate movement, both by rail and by motor carrier. It is those decisions, extending the exemption to totally intrastate highway transportation, that is the subject of the present petitions for review.

Analysis

The thrust of the argument of the State of Texas is that the I.C.C. lacks jurisdiction over the trucking segment of the totally intrastate TOFC activities of the intrastate rail carriers. Without this jurisdiction, Texas maintains, the I.C.C. could not exempt the in-

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[1] The I.C.C. decision terminating the temporary certification granted to Texas was recently affirmed by the Circuit Court of Appeals for the District of Columbia. *The Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C.Cir. 1985).

trastate highway transportation from state regulation. We are constrained to agree.

The general jurisdiction of the I.C.C. over rail transportation is contained in 49 U.S.C. § 10501. It cannot be gainsaid that the predicate for that authority is the interstate or foreign aspect of rail transportation. The reference in § 10501(a)(1) is to transportation by railroad and by two specific railroad and intermodal functions, not including TOFC and COFC rail/highway activity. Section 10501 was amended by the Staggers Rail Act of 1980, 94 Stat. 1895 (codified in scattered sections of 49 U.S.C.), but no changes were made to § 10501(a)(1). Section 10501(a)(2) makes abundantly clear that this grant of jurisdiction to the I.C.C. extends only to transportation having an interstate or foreign dimension, the transportation must originate in or traverse a sister state or foreign country.

The general jurisdiction of the I.C.C. over motor carrier transporation is found in § 10521. This section also contains the jurisdictional prerequisite of interstate or foreign travel and excludes totally intrastate motor carrier transportation. The language of subsection (b) specifically provides that except as to certain passenger and express services, not pertinent herein, the congressional grant of jurisdiction to the I.C.C. "does not affect the power of a State to regulate intrastate transportation provided by a motor carrier." 49 U.S.C. § 10521(b)(1).[2]

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[2] As most recently amended, 49 U.S.C. § 10521(b) provides:

This subtitle does not—

(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

The United States and the I.C.C. cite 49 U.S.C. § 10505, and our decision in *American Trucking Associations v. I.C.C.*, in support of the I.C.C. decisions. We find neither controls. Section 10505 authorizes the I.C.C. to exempt rail carriers from regulation. The introductory language of § 10505 belies respondents' contentions, for it specifically is limited to "transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter," the subchapter being 49 U.S.C. §§ 10501 *et seq.* As noted above, totally intrastate motor carriers are not subject to I.C.C. jurisdiction under this subchapter. Nor, we might add, under any other subchapter of this title.

Our decision in *American Trucking* does not direct a contrary conclusion. There the I.C.C. exempted interstate TOFC and COFC rail/truck transportation from regulation, and we affirmed, concluding that "the Commission had the authority under section 10505(a) to exempt motor carrier TOFC/COFC service provided by rail carriers." 656 F.2d at 1122. The rail travel in *American Trucking* was interstate; the motor carrier travel involved interstate transportation. In *American Trucking* we recognized that the I.C.C. properly exercised its authority to exempt from

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(2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

regulation that portion of rail and motor carrier transportation over which it had jurisdiction.

We are mindful that the I.C.C. has been given jurisdiction over intrastate rail traffic. A principal change occasioned by the Staggers Rail Act was the curtailment of the authority of the states to regulate that traffic. The I.C.C. has authority to exempt rail carriers from regulations. 49 U.S.C. § 10505(a). Once exempted by the I.C.C., rail carriers are not subject to any regulations. The I.C.C. has authority "to exempt transportation that is provided by a rail carrier as a part of a continuous intermodal movement." 49 U.S.C. § 10505(f). But to accept uncritically the I.C.C.'s argument that it can exempt intrastate trucking connected with intrastate rail travel from all regulation would be to court potential mischief. A small intrastate rail carrier could transport goods, in a trailer capable of TOFC movement, from the point of origination to its terminal, which might be close or at a distance. The trailer then could be loaded on a flatcar and moved by rail a few miles and thereafter continue its journey anywhere within the State of Texas, totally exempt from any motor carrier regulation. Extending the worst case scenario, one might envision a small intrastate railroad which operates many trucks. A trailer load is picked up by truck at Orange, Texas and transported hundreds of miles to the intrastate rail carrier's terminal on the eastern fringe of San Antonio. There the trailer is placed on a flatcar and transported across the city to a terminal on the western edge of that city. At that point, the trailer is removed from the flatcar, attached to a cab (perhaps the same one), and driven additional hundreds of miles across Texas highways to El Paso. That movement of goods would involve

transportation by motor carrier across the entire State of Texas, except for the few miles across the city of San Antonio, but be completely free of regulation by state authorities.

We are not persuaded that in passing either the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, or the Staggers Rail Act, or accompanying legislation, Congress intended to prohibit the states from regulating motor carriers that operate totally intrastate. The language in the statutes both before and after the recent amendments clearly indicates the contrary. In 1982 Congress amended 49 U.S.C. § 10521(b)(1) which previously provided simply: "This subtitle does not affect the power of a State to regulate intrastate transportation provided by a motor carrier." Congress created three exceptions which now affect the power of the states over intrastate mtor carrier transportation. None of these exceptions involve intrastate trucking by intrastate rail carriers in an intermodal setting. If Congress had intended to change the power of the states to regulate that activity, it could, and presumptively would, have added a fourth exception to the power of the states to regulate intrastate transportation by motor carriers. The Congress chose not to do so.

We conclude that intrastate transportation by a motor carrier, even if done in conjunction with a measure of intrastate rail transportation in the TOFC/COFC intermodal setting, is subject to regulation by the states. The I.C.C. exceeded its jurisdiction when it exempted intrastate rail carriers from all regulation of their totally intrastate motor carrier activities.

The petitions for review are GRANTED. The orders are REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4169

ICC No. 39627

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY and
SOUTHERN PACIFIC TRANSPORTATION COMPANY,
INTERVENING-RESPONDENTS

On Petition for Review of
Interstate Commerce Commission
Decision No. 39627

Before GARZA, POLITZ, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order

of the Interstate Commerce Commission in this cause is reversed, and the cause is remanded to the Commission for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that respondents and intervening-respondents pay to petitioner the costs on appeal, to be taxed by the Clerk of this Court.

September 6, 1985

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4386

ICC No. 39704

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ROAD-RAIL TRANSPORTATION COMPANY, INC.,
INTERVENING-RESPONDENT

On Petition for Review of
Interstate Commerce Commission
Decision No. 39704

Before [illegible], POLITZ, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of the State of Texas for review of an order of the Interstate Commerce Commission and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission in

this cause is reversed, and the cause is remanded to the Commission for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that respondent and intervening-respondent pay to petitioner the costs on appeal, to be taxed by the Clerk of this Court.

September 6, 1985

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 84-4169 & 84-4386

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Order of the
Interstate Commerce Commission

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 09/06/85, 5 Cir., 198—, —— F.2d ——)

(November 15, 1985)

Before GARZA, POLITZ and DAVIS, Circuit Judges

PER CURIAM:

(✓) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT .

Nos. 84-4169 &
84-4386

STATE OF TEXAS, PETITIONER

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

On Petition for Review of an Order of
Interstate Commerce Commission

[Filed Nov. 27, 1985]

ORDER:

[ ] The motion of respondents for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[✓] The motion of respondents for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including January 21, 1986, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above

mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[ ] The motion of ———————— for a further stay of the issuance of the mandate is GRANTED to and including ————, under the same conditions as set forth in the preceding paragraph.

[ ] The motion of ———————— for a further stay of the issuance of the mandate is DENIED.

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX F

INTERSTATE COMMERCE COMMISSION DECISION

No. 39627

PETITION UNDER 49 U.S.C. 11501(c) BY MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL., FOR REVIEW OF AN ORDER OF THE RAILROAD COMMISSION OF TEXAS

Decided: January 19, 1984

[Service Date Jan. 23, 1984]

By petition filed December 20, 1983, Missouri-Kansas-Texas Railroad Company (MKT), Burlington Northern Railroad Company (BN), Missouri Pacific Railroad Company (MP), and Southern Pacific Transportation Company (SP) ("Texas carriers") seek review of a December 5, 1983, order of the Railroad Commission of Texas (RCT), pursuant to 49 U.S.C. 11501(c). RCT's order exempts from intrastate regulation trailer-on-flatcar (TOFC) and container-on-flatcar (COFC) movements within Texas, but not incidental motor transportation provided by rail carrier as part of a continuous intermodal movement. The Texas carriers contend that RCT's refusal to extend the TOCF/COFC exemption to include rail TOFC/COFC operations conducted in trucks owned and operated by the railroads violates applicable Federal standards. RCT replied.

BACKGROUND

MKT's September 27, 1982, application before RCT (MP, BN and SP intervening) was heard by an examiner who issued a proposal for decision on October 19, 1983. The Texas carriers filed exceptions, but the examiner's findings of fact and conclusions of law were expressly adopted by RCT in its order.

> [T]his proceeding does not involve the exemption of trucking operations performed by the railroads in connection with TOFC/COFC service. The issue before the RCT is whether TOFC/COFC service is to be exempted. TOFC/COFC service is transportation on a *rail car* of freight laden trucks, trailers, semi-trailers, or their container portions, or empty trucks, trailers, semi-trailers, or their container portions when they are moving incidental to prior or subsequent use in TOFC/COFC service.
>
> In its decision in Ex Parte 230, the ICC addressed the exemption of both TOFC/COFC service *and* trucking operations conducted by the railroads in connection with TOFC/COFC service. The instant application filed with the RCT is limited to the exemption of intrastate TOFC/COFC service itself. The public is not on notice that related trucking operation exemptions would be addressed in this proceeding. Furthermore, even if, arguendo, the notice problem were absent, the applicant did not present evidence of the scope of such trucking operations or evidence relating to whether rate regulation is necessary to protect shippers from the abuse of market power relative to any exemption of trucking operations performed by the railroads in connection with TOFC/COFC service.

DISCUSSION

Section 11501(c) provides, as pertinent, that any rail carrier furnishing transportation subject to the jurisdiction of this Commission may petition us to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the preemptive Fedral provisions. If we determine that the standards and procedures applied by the State were improper, we must then determine the appropriate rate, classification, rule, or practice and authorize the carrier to establish it.

In Ex Parte No. 388, *State Intrastate Rail Rate Authority—P.L. 96-448*, (*Illinois* decision), 367 I.C.C. 149 (1983), the Commission stated that simple application by the States of section 10505 criteria is not sufficient compliance with Federal standards. We essentially concluded that the States in adopting standards and procedures consistent with Federal law must also follow Commission approved exemptions as to rates, rules, classifications, and practices. We concluded that, once a particular category of traffic is exempted by us, it becomes a standard from which states may not deviate, subject to a possible exception relating to unique conditions. Thus, once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption. *See* No. 39355, *Petition Under 49 U.S.C. 11501(c) for Review of an Order of the Public Utilities Commission of Colorado* (not printed), served July 5, 1983, where we authorized the Union Pacific Railroad Company to publish a tariff canceling all rates, charges, rules, and regulations in connection

with the Colorado intrastate movement of agricultural commodities that had been exempted from Federal regulation, and *Iron Sulphate Exemption*, 367 I.C.C. 503, 504 (1983). This principle has been affirmed in other cases. For example, in Ex Parte No. 338 (Sub-No. 25), *Intrastate Rail Rate Authority—Ohio* (not printed), served October 18, 1983, we found unacceptable Ohio's language that it would continue intrastate regulation of Federally exempted traffic:

> Following an exemption decision by the Interstate Commerce Commission, the PUCO may initiate a proceeding, either upon its own motion or upon petition, to evaluate feasible changes in Ohio intrastate regulation which might be consistent with Interstate Commerce Commission regulation.

> This approach is permissible if the proceeding contemplated is instituted only to evaluate and recommend to the ICC possible deviations from Federal exemptions applicable to the state, but the proceeding cannot be a condition precedent to Ohio's initial adoption of Federal exemptions. We will require Ohio to promulgate more specific regulations in this area, including the particular renunciation of its ability to regulate intrastate traffic exempted at the interstate level by this Commission, unless it has obtained *prior* Commission sanction. (Emphasis added).

See also Ex Parte No. 388 (Sub-No. 4), *Intrastate Rail Rate Authority—Florida* (not printed), served March 18, 1983).

The Commission in 1981, pursuant to 49 U.S.C. 10505, exempted rail and motor service provided in connection with TOFC/COFC from regulation under

title 49.[1] *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981), 365 I.C.C. 728 (1982). This exemption was affirmed by the courts in *American Trucking Assoc. Inc.* v. *I.C.C. and U.S.*, 656 F.2d 1115 (5th Cir. 1981). Accordingly, the RCT may not apply less than the complete exemption approved by us without first demonstrating to our satisfaction that unique conditions in Texas render inappropriate the adoption of the complete TOFC/COFC exemption. *Illinois, supra* at 154. The RCT has not made this showing.

It is unfortunate that the Texas carriers and intrastate shippers have been deprived unnecessarily of the full range of benefits available to them under the Federal exemption. Whatever lingering doubts may have existed as to our authority to promulgate regulations binding on the States have been dispelled by the recent decisions in *Wheeling Pittsburgh Steel Corp.* v. *ICC*, —— F.2d —— (3d Cir., Dec. 21, 1983) and *Illinois Central Gulf R.R. Co.* v. *ICC*, 702 F.2d 111 (7th Cir., 1983).

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[1] See 49 CFR 1039.13 which provides as follows:

> Railroad and truck transportation provided by a rail carrier as part of a continuous intermodal movement is exempt from the provisions of Subtitle IV of Title 49 with certain exceptions. Carriers must continue to comply with Commission accounting and reporting requirements. All railroad tariffs pertaining to the transportation of intermodal freight will no longer apply except to the extent adopted by carrier quotations. Nothing in this exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent order of this Commission.

As we have noted in numerous prior decisions concerning intrastate rail contracts, the failure of the RCT to apply Commission standards and the resulting railroad petitions for relief must and will be evaluated in terms of their effect on the pending application in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority (Texas)*. That proceeding is one of several involving certification under 49 U.S.C. 11501, which charges the Commission with ensuring that the States will regulate consistently with the Federal scheme. In making certification determinations, we must rely, in some measure, on evidence of a State's good faith as well as its specific rules and regulations. In view of the *Wheeling-Pittsburgh* and the *Illinois Central* decisions, *supra*, any further refusals by the RCT to apply fully the specific commodity exemptions adopted by the Commission will raise very serious questions of RCT's good faith in establishing and following standards and procedures "in accordance with the standards and the procedures applicable to regulation of rail carriers by the Commission under this title." 49 U.S.C. 11501(b)(3)(A).

CONCLUSIONS

Under 49 U.S.C. 11501(c), we find that the RCT's refusal to apply the entire exemption approved by us in *Improvement of TOFC/COFC Regulation*, *supra*, violated Federal standards and procedures binding upon the RCT in its regulation of intrastate commerce. We therefore determine that the entire TOFC/COFC exemption is in effect in the State of Texas, and we authorize the Texas carriers to establish any rate, classification, rule, or practice pertaining to intrastate rail or motor transportation provided by a

rail carrier as part of a continuous intermodal movement within the State of Texas, to the same extent and in the same manner that they establish rates, classifications, rules, or practices for similar interstate movements.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date of service.

2. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Chairman Taylor concurred in the result with a separate expression.

[SEAL]

JAMES H. BAYNE
Acting Secretary

CHAIRMAN TAYLOR, concurring in the result:

I still vehemently disagree with the rationale underlying this decision's pronouncement that "once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption." See my dissents in *State Intrastate Rail Rate Authority—P.L. 96-448*, 367 I.C.C. 149, 154-6 (1983) and Ex Parte No. 388 (Sub-No. 25), *Intrastate Rail Rate Authority—Ohio* (not printed), served October 18, 1983.

However, despite my having opposed the inclusion of I.C.C. exemptions within the obligatory standards that the States are bound to observe, such inclusion has become an administrative fait accompli. Accordingly, this Commission is now statutorily required to see that our standards are enforced.

APPENDIX G

INTERSTATE COMMERCE COMMISSION DECISION

No. 39704

PETITION OF ROAD-RAIL TRANSPORTATION COMPANY, INC., UNDER 49 U.S.C. 11501(c) FOR REVIEW OF AN ORDER OF THE RAILROAD COMMISSION OF TEXAS

Decided: April 11, 1984

[Service Date Apr. 13, 1984]

By petition filed March 13, 1984, under 49 U.S.C. 11501(c), Road-Rail Transportation Company, Inc. (Road-Rail) seeks review of an order of the Railroad Commission of Texas (RCT) denying in part an application for exemption from regulation of service provided in Road-Railer equipment.[1] RCT replied to the petition.

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[1] Road-Railers are semi-trailers designed for use both on highways and on railroads. They are moved between railroad terminals in trains of 20 to 75 units by railroad locomotives and transported over highways for pickups and deliveries. *See* Finance Docket No. 29898, *Road-Rail Transportation Company, Inc.—Petition for Exemption* (not printed), served August 27, 1982 (*Road-Rail*).

RCT denied an exemption for the segments of Road-Rail's service that would be conducted over the highway. It found that, in some instances, the highway movement could be so substantial as to make Road-Rail a motor carrier; that exemption of the proposed service could be injurious to for-hire motor carriage, thereby depriving shippers of a protection from abuse of rail market power; and that an exemption would, for this reason, violate RCT's duty under Texas law "to carefully preserve, foster, and regulate transportation." Tex. Rev. Civ. Stat. Ann., Art. 911b § 4 (d). RCT exempted Road-Rail's over-the-rail service only between Houston and Ft.Worth-Dallas, stating that its public notice concerning the application identified operations only between these points.

On petition, Road-Rail contends that RCT's decision violates applicable Federal standards by failing to grant a full exemption for Road-Rail service based on the exemption for intermodel service granted by us in *Improvement of TOFC/COFC Regulation*, 364 I.C.C. 731 (1981) (TOFC/COFC). In footnote 1 of that decision we stated, "we intend the exemption to extend to 'Roadrailer' equipment and any other equipment developed to be used in intermodal service." RCT replies that it is not bound by the exemptions we grant under 49 U.S.C. 10505 unless it decides independently to extend those exemptions to Texas intrastate commerce. It argues it has been given inadequate notice and opportunity to be heard concerning the application of our exemptions to Texas.

DISCUSSION AND CONCLUSIONS

Section 11501(c) provides, as pertinent, that any rail carrier furnishing transportation subject to the jurisdiction of this Commission may petition us to

review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the preemptive Federal provisions. If we determine that the standards and procedures applied by the State were improper, we must then determine the appropriate rate, classification, rule, or practice and authorize the carrier to establish it.

In *State Intrastate Rail Rate Authority—P.L. 96-488*, 367 I.C.C. 149 (1983) (*Illinois II*),[2] the Commission in considering Illinois' certification request, stated that simple application by the States of section 10505 criteria is not sufficient compliance with Federal standards. We essentially concluded that the States, in adopting standards and procedures consistent with Federal law, must also follow Commission-approved exemptions as to rates, rules, classifications, and practices. Once a particular category of traffic is exempted by us, it becomes a standard from which States may not deviate, subject to a possible exception relating to unique conditions. Thus, once a Federal exemption is adopted, it applies automatically to intrastate commerce without need for individual State adoption. We have reaffirmed and applied this principle in a number of subsequent decisions.[3]

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[2] The *Illinois II* decision was issued after comments were received pursuant to our decision in *State Intrastate Authority-P.L. 96-488*, 365 I.C.C. 855 (1982) (*Illinois I*).

[3] *See, e.g.*, No. 39667, *Petition of Missouri Pacific Railroad Company under 49 U.S.C. 11501(c) for Review of Three Orders of the Rail Rate Board of the Railroad Commission of Texas* (not printed), served March 9, 1984, and decisions cited therein.

RCT contends that we lack authority to extend our exemptions to intrastate commerce because the RCT was not accorded a fair hearing. Texas received sufficient notice of the relevance of other State proceedings to its own. We stated that the *Illinois I* decision could be useful to other States and thus extended the deadline for other States submitting their standards and procedures. In *Illinois II*, we clearly indicated that the policy established there was binding on the "States," not just on Illinois. 367 I.C.C. at 152. We again gave the States time to supplement their filings in accordance with the principles stated there. Copies of those decisions were served on Texas. Thus, it was plain that the *Illinois* analysis was case law precedent that was to be followed by all the other States seeking certification. Moreover, notices of all our major rulemakings, including the TOFC/COFC exemption, were published in the *Federal Register*. Comments were requested, and Texas was free to partcipate in these proceedings.

We specifically found in the Road-Rail case, *supra* (see fn. 1), that Road-Rail is a rail carrier subject to our jurisdiction, that its rail *and* highway operations constitute intermodal service provided by a rail carrier, and that such operations are "covered by the exemption already granted" in the *TOFC/COFC* proceeding. In a decision served January 23, 1984,[4] we determined that the entire TOFC/COFC exemption is in effect in the State of Texas and we authorized four railroads to establish their rates and practices accordingly. Thus, the failure of RCT to recognize

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[4] No. 39627, *Petition under 49 U.S.C. 11501(c) by Missouri-Kansas-Texas Railroad Company, et al., for Review of an Order of the Railroad Commission of Texas* (not printed), served January 23, 1984.

an exemption for all of Road-Rail's intermodal rail and highway operations within Texas is a clear violation of Federal standards.

It is unfortunate that the Texas carriers and intrastate shippers have been deprived unnecessarily of the full range of benefits available to them under the Federal exemption. Whatever lingering doubts may have existed as to our authority to promulgate regulations binding on the State should have been dispelled by the recent decisions in *Wheeling Pittsburgh Steel Corp.* v. *ICC*, 723 F.2d 346 (3d Cir. 1983) and *Illinois Central Gulf R.R. Co.* v. *ICC*, 702 F.2d 111 (7th Cir. 1983).

As we have noted in numerous prior decisions concerning intrastate rail contracts, the failure of RCT to apply Commission standards and the resulting railroad petitions for relief must and will be evaluated in terms of their effect on the pending application in Ex Parte No. 388 (Sub-No. 31), *State Intrastate Rail Rate Authority (Texas)*. This proceeding is one of several involving certification under 49 U.S.C. 11501, which charges the Commission with ensuring that the States will regulate consistently with the Federal scheme.

Under 49 U.S.C. 11501(c), we find that the RCT's refusal to accord Road-Rail the benefits of the entire exemption approved by us in TOFC/COFC violated Federal standards and procedures binding upon RCT in its regulation of intrastate commerce. As noted above, we have previously determined in No. 39627, *supra*, that the entire TOFC/COFC exemption is in effect in the State of Texas and in *Road-Rail*, *supra*, that the service at issue here is covered by that exemption. Consequently, we authorize Road-Rail to establish any rate, classification, rule, or practice pertain-

ing to intrastate rail or motor transportation that Road-Rail provides as a rail carrier as part of a continuous intermodal movement within the State of Texas, to the same extent and in the same manner that it establishes rates, classifications, rules or practices for similar interstate movements.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. This decision is effective on the date of service.

2. This proceeding is discontinued.

By the Commission, Chairman Taylor, Vice Chairman Andre, Commissioners Sterrett and Gradison. Commissioner Gradison did not participate.

[SEAL]

JAMES H. BAYNE
Acting Secretary

APPENDIX H

STATUTES INVOLVED

Section 11501, Title 49, United States Code, provides that:

> § 11501. Interstate Commerce Commission authority over intrastate transportation
>
> (a) The Interstate Commerce Commission shall prescribe the rate, classification, rule or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes—
>
> (1) between persons or localities in intrastate commerce and in interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or
>
> (2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.
>
> (b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.
>
> (2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate

rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after the receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period

commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission un-

der subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate

under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title—

> (A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and
>
> (B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that—

> (A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds—

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3) (A) A motor common carrier of passengers must file an application with the Commission for

prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency of other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection (e)(3)(B) of this section. Action of the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.

Section 10505, Title 49, United States Code, provides that:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that

is provided by a rail carrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

Section 10501, Title 49, United States Code, provides that:

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in

the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Section 10101a, Title 49, United States Code, provides that:

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious

regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

Section 10521, Title 49, United States Code, provides that:

§ 10521. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier—

(1) between a place in—

(A) A State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United

States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

(b) This subtitle does not—

(1) except as provided in sections 10922 (c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier;

(2) except as provided in sections 10922 (c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier;

(3) except as provided in section 10922 (c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or

(4) except as provided in section 11503a and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

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